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REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W. WHITE, JR.; KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; AND CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL, PETITIONERS

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND SEVENTEEN OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Interest of *Amici Curiae* and Summary of Argument 1

Argument 3

I. In the public sector, core collective-bargaining topics implicate policy matters of great public concern. 3

A. The State coerces political speech when it requires government employees to pay for public-sector bargaining. 4

B. The policy debates in public-sector bargaining concern more than just topics incidental to the core mission of bargaining. 7

C. Collective bargaining affects public policy in ways not meaningfully different from lobbying. 8

II. The policy consequences of public-sector bargaining are direct and significant. 9

A. Collective bargaining helped cause multiple municipal bankruptcies. 11

1. Detroit, Michigan 11

2. Stockton, California 17

3. San Bernardino, California 19

B. Public-employee benefits are also of significant public interest at the state level. 20

C. Collective bargaining can also have significant non-fiscal effects—for example, impeding environmental compliance. 25

Conclusion 33

Additional Counsel 34

TABLE OF AUTHORITIES

Cases

Abood v. *Detroit Board of Education*,
431 U.S. 209 (1977) ..... passim

Harris v. *Quinn*,
134 S. Ct. 2618 (2014) ..... passim

In re Pension Reform Litig.,
32 N.E.3d 1 (Ill. 2015) 21, 22

Jones v. *Mun. Employees' Annuity and Ben. Fund of Chicago*,
No. 14CH20027, 2015 WL 4662009 (Ill. Cir. Ct., Cook Cty., Jul. 24, 2015) 21

Knox v. *Serv. Employees Int'l Union, Local 1000*,
132 S. Ct. 2277 (2012) 6, 9

Lehnert v. *Ferris Faculty Ass'n*,
500 U.S. 507 (1991) 6, 11, 17, 32

Machinists v. *Street*,
367 U.S. 740 (1961) 5

Madison Teachers, Inc. v. *Walker*,
851 N.W.2d 337 (Wis. 2014) 22

Railway Employees' Department v. *Hanson*,
351 U.S. 225 (1956) 5

Senior Accountants, Analysts & Appraisers Ass'n v. City of Detroit,
553 N.W.2d 679 (Mich. App. 1996) 13

United States v. *City of Detroit*,
No. 77-71100, 2011 WL 4014409 (E.D. Mich. Sept. 9, 2011) 27, 28, 29

INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT

Does collective bargaining in the public sector implicate matters of public concern, or does it "pertain[] mostly to private concerns" involving only the government's interests as an employer, rather than as a sovereign? *Harris* v. *Quinn*, 134 S. Ct. 2618, 2654 (2014) (dissent). The answer to that question is significant to the states, and it is simple: it *does* implicate matters of public concern. Consider, for example, Detroit's recent bankruptcy: Detroit's $3.5 billion in unfunded pension liabilities was a matter of great public concern not just for the city, but for all of Michigan.

In *Abood*, this Court concluded that state interests in labor peace and preventing free-riding, which purportedly justified allowing a *private* employer to coerce private-employee speech on matters that largely have *no* public policy implications, equally justified allowing *the government* to coerce public-employee speech on matters with *significant* public policy implications. The Court thus held that it is constitutional to require a public-sector employee to fund union collective bargaining. At the same time, however, the Court recognized that it is unconstitutional to require the employee to fund the union's other political activities. This distinction assumes either that the core subjects addressed in public-sector bargaining—pensions, wages, and the size of the workforce—lack any public-policy implications, or that sufficient state interests exist to justify overriding public employees' First Amendment rights.

Neither premise is true. It is time to abandon the meaningless distinction between collective bargaining and other political activity. In the public sector, core collective bargaining topics such as wages, pensions, and benefits inherently implicate public policy, and in ways that matter. Like lobbyists, public-sector unions obtain binding agreements from the government that have enormous public impact—all without the natural counterweight of a financial market that exists in the private sector. In the public sector, it is taxpayers, not business owners and consumers, who foot the bill—and the bill is often steep.

The issue presented in this case is significant to the states, and *amici* States support Petitioners' arguments. *Amici* States have a vital interest in protecting the First Amendment rights of public employees, and in the fiscal health of state and local governments. But rather than re-urge Petitioners' arguments here, *amici* States limit their discussion to the direct and substantial public impact that public-sector bargaining has on core employment issues, and to the illusory nature of *Abood*'s distinction between that activity and other political or ideological activity, as illustrated by recent examples from several states and municipalities. As these and countless other examples make clear, collective bargaining in the public sector is at core a political activity with direct and significant implications for the public at large—not merely a "private concern[]" between employer and employees. The constitutional analysis should reflect the reality of public-sector bargaining.

ARGUMENT

I. In the public sector, core collective-bargaining topics implicate policy matters of great public concern.

In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), this Court drew a line between, on one hand, union expenditures for political or ideological purposes unrelated to collective bargaining, and, on the other, expenditures related to collective bargaining, contract administration, and grievance adjustments. *Id.* at 225–37. The *Abood* Court held it unconstitutional to force public-sector employees to contribute to the former category of union expenditures, reasoning that "in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234. Citing the principle that the state cannot compel an individual to associate with a political party as a condition of public employment, the Court held that the First Amendment likewise prohibits a state "from requiring [public employees] to contribute to the support of an ideological cause he may oppose as a condition of holding a [public] job[.]" *Id.* at 235.

Despite this promising beginning, the *Abood* Court nonetheless held that the First Amendment is not offended by requiring public employees to subsidize a union's collective bargaining activity. While the Court noted several distinctions between collective bargaining in private versus public employment, the Court ultimately held that a public employee does not have "a weightier First Amendment interest than a private employee in not

being compelled to contribute to the costs of exclusive union representation." *Id.* at 229.

A. The State coerces political speech when it requires government employees to pay for public-sector bargaining.

As this Court recognized both in *Abood* and recently, however, public- and private-sector bargaining are not analogous. For one, it is the state, not a private employer that is directly forcing subsidization of union speech in the public sector. *Id.* at 250 (Powell, J., concurring); *Harris* v. *Quinn*, 134 S. Ct. 2618, 2632 (2014). For another, the public significance of the coerced speech differs in the private and public sectors, though the core bargaining topics may at first blush appear to be the same.

It is largely undisputed that collective bargaining in both the public and private sectors touches on hot-button political issues. As *Abood* recognized, "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222. "An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative":

> His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the

> road to serfdom for the working class, while another might have economic or political objections to unionism itself. . The examples could be multiplied. [*Id.*]

The *Abood* Court noted that under *Railway Employees' Department* v. *Hanson*, 351 U.S. 225 (1956), and *Machinists* v. *Street*, 367 U.S. 740 (1961), the problems of labor peace and free-riding justified compelling private employees to contribute to the costs of exclusive union representation. And the *Abood* Court reasoned that such rationales applied equally in the public sector. *Id.* at 222–30.

But aside from overlooking the significance of the different actors involved, the *Abood* Court failed to account for the difference between the *core* union speech—*i.e.*, speech on basic levels of wages, pensions, and other employment benefits—involuntarily subsidized by dissenting *private*-sector employees and that subsidized by their counterparts in the *public* sector. *Harris*, 134 S. Ct. at 2632. In the public sector, these bread-and-butter bargaining topics are important public policy issues because of their impact on the public fisc and the allocation of resources, whereas those same topics in the private sector are generally *not* of public interest. *Id.*

When the party on the opposite side of the table is the government, bargaining is unavoidably about the use of public resources and about how elected officials will govern. Bargaining concessions affect fundamental public policy issues such as wages, merit pay, pensions, hours, benefits, and other terms of public employment—the balancing of which affects, for example, the level of public services,

priorities within state and local budgets, creation of bonded indebtedness, and tax rates. *Abood*, 431 U.S. at 258 (Powell, J., concurring). And "[p]ublic-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions." *Knox* v. *Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2295 (2012).

These are topics about which employees as voters are likely to hold strong personal views. See Section II. Contra *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) ("[U]nlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views."). As this Court has recognized, such topics are "a matter of great public concern" in the public sector. *Harris*, 134 S. Ct. at 2642–43. In the public sector, we are all shareholders. A government employee might have strong policy objections to a position advanced by the union on a core collective bargaining topic, in a way for which there is no analogy for an employee of a private business. The government's relationship to its employees is inextricably intertwined with issues of public policy.

Thus, the public significance of the collective-bargaining speech at issue—wages, pensions, benefits, and other terms and conditions of employment—is entirely different in the public and private sectors, though the topics abstracted from their contexts may appear to be the same.

B. The policy debates in public-sector bargaining concern more than just topics incidental to the core mission of bargaining.

Moreover, the core of collective-bargaining activity in the public sector strikes at the heart of critical public policy issues in a way that private-sector bargaining simply does not. The purpose of collective bargaining is to reach agreement that is favorable to employees—as employees—on such basic topics as the levels of wages, pensions, benefits, and other terms and conditions of employment. These matters are the very essence of bargaining. While working to reach agreement on these matters may at times require addressing hot-button political topics such as abortion or religion, in both the public and private sectors, those topics often arise as incidents to the union's core function in bargaining: to set the basic levels of these terms and conditions of employment.

But in the public sector, intrusion into debated policy matters ceases to be just a side effect of bargaining, but instead becomes the essence of the activity itself. Setting basic levels of wages, pensions, benefits, and other terms and conditions of employment—the very crux of bargaining—is of great public concern in the public sector. The policy debates that arise are not merely details, such as whether company health insurance will cover birth control, in a larger scheme that lacks public implications. Instead, the basic question of how much the State will pay its employees is a public policy question unto itself.

Even if the interests in labor peace and preventing free-riding could justify incidental incursions into employees' free speech rights, in the name of fostering the larger, policy-neutral activity of collective bargaining, those state interests cannot justify an activity the very essence of which intrudes on policy beliefs. *Cf. Harris*, 134 S. Ct. at 2654 (dissent) ("On the one side, *Abood* decided, speech within the employment relationship about pay and working conditions *pertains mostly to private concerns* and implicates the government's interests as employer; *thus, the government could compel fair-share fees for collective bargaining*. On the other side, speech in political campaigns *relates to matters of public concern* and has no bearing on the government's interest in structuring its workforce; *thus, compelled fees for those activities are forbidden*." (emphasis added)).

C. Collective bargaining affects public policy in ways not meaningfully different from lobbying.

The nature of core bargaining speech is not only different in the public and private sectors, but it is indistinguishable from "other political or ideological" speech by unions, the coerced support of which *Abood* prohibited. In the public sector, both collective bargaining and "political advocacy and lobbying" are directed at the government, *Harris*, 134 S. Ct. at 2632, and often concern the very same topics. And, just like lobbying, bargaining results in binding agreements from the government on those matters. In either case, "public employee unions attempt to influence governmental policy-making." *Abood*, 431 U.S. at 231. Indeed, "[t]he collective-bargaining

agreement to which a public agency is a party is not merely analogous to legislation, it has all of the attributes of legislation for the subjects with which it deals." *Abood*, 431 U.S. at 252–53 (Powell, J., concurring). Bargaining commitments are even stronger in some cases than legislation: Once executed, changing a collective bargaining agreement can be difficult or impossible given that the same political "party" (the union) is always in power over those being represented (the public employees).

II. The policy consequences of public-sector bargaining are direct and significant.

Core public-sector bargaining activity affects public policy in ways that are direct, concrete, and often large—not merely in the indirect sense that any decision by an elected official affects public resources. Contra *Harris*, 134 S. Ct. at 2655 (dissent) ("[T]his Court has never come close to holding that any matter of public employment affecting public spending (which is to say most such matters) becomes for that reason alone an issue of public concern."). As this Court has recognized, a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. The impact of collective bargaining on matters of public concern is not merely abstract or incidental; instead, it has enormous consequences for, among other things, the fiscal solvency of state and local governments. These consequences demonstrate why issues at the heart of public-sector bargaining are matters of great public concern, and are not merely employment issues between employee and employer.

For one thing, while bargaining in the private sector naturally has the counterweights of supply and demand and financial self-interest, public-sector unions and their bargaining partners lack those constraints. *Abood*, 431 U.S. at 228 (recognizing that a public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases"). In theory, a government official's interest in keeping votes and winning re-election should provide some counterweight against acceding to unsustainable benefits in response to union demands. But experience has shown that this often does not occur.

What is more, collective bargaining in the public sector also has substantial policy effects that exacerbate the First Amendment problems created by forcing employees to subsidize such speech. In many instances, the existence of collective-bargaining agreements creates a policy bottleneck that makes it difficult, if not impossible, for elected officials to address important policy matters through legislation. Public-sector unions not only take positions on politically charged issues in the course of bargaining, but in some cases that bargaining becomes the only mechanism by which those policy issues can be addressed. Where public problems are resolved solely through the collective-bargaining process, a dissenting employee who disagrees with his union's collective-bargaining position not only has to subsidize the union's advocacy of that policy position, but he also has little or no recourse in the general political process. Forcing the employee to fund his union's policy monopoly permits the union to "use each dissenter as an instrument for fostering

public adherence to an ideological point of view he finds unacceptable." *Lehnert*, 500 U.S. at 522 (internal quotations omitted).

While the examples abound of bargaining directly implicating hotly debated political issues, amici States draw this Court's attention specifically to occasions in which political positions taken on central topics in public-sector bargaining have had direct, intense, and far-reaching public effects.

A. Collective bargaining helped cause multiple municipal bankruptcies.

Public-employee benefits—the staple of collective bargaining—are of immense public concern throughout the country. As this Court has recognized, "the importance of the difference between bargaining in the public and private sectors has been driven home" in the years since *Abood*, given how state and local expenditures on employee wages and benefits have mushroomed. *Harris*, 132 S. Ct. at 2632.

1. Detroit, Michigan

The circumstances in Detroit are extreme in degree, but not atypical in kind: collective bargaining and the decisions that state and local governments make regarding benefits to unionized employees play a key role in the fiscal health of any local government. The claim that these issues hover on the periphery of public policy or are confined to the employment relationship is belied by the reality of collective bargaining. Detroit's experience is a case study.

For many years, the City of Detroit's workers enjoyed steady rates of return on their Annuity Savings Plan investments. This would be quite understandable if the returns came from the investments, but they did not: the returns persisted regardless of how the investments actually performed, with the supposed investment returns being paid out of city funds during years when the investments actually lost money.

Under the terms of the Plan, active city workers could invest a percentage of their salaries into a defined contribution plan that earned interest based on a rate of return established at the discretion of fund trustees. The trustees invested the annuity plan contributions along with fund pension assets. But instead of crediting to employees' accounts the actual or assumed rate of return, the fund trustees "essentially operated the Annuity Savings Plan as a guaranteed investment contract with a guaranteed floor investment return approaching 7.9%." (City of Detroit, No. 13-53846, Bankr. E.D. Mich., Dkt. 4391, Fourth Am. Discl. Stmt. ("Disc. Stmt."), May 5, 2014, at 106; Union testimony, MERC Hrg., Feb. 8, 2013 ("MERC Hrg."), at 14-15.) In 2009, for example, the General Retirement System fund *lost* 24.1% of the value of its assets, yet it credited Annuity Savings Plan accounts with a *positive* investment return of approximately 7.9%. (Disc. Stmt. at 106.) The fund paid the inflated rates by diverting hundreds of millions of dollars from fund assets that were intended to support the traditional defined pension benefits. (Bankr. Dkt. 13, Charles Moore Decl., Jul. 18, 2013 ("Moore Decl."), ¶ 18.)

On the flip side of this coin, in years when fund investments outperformed annual expectations, instead of retaining and reinvesting the "excess," the City's general pension fund paid out a portion of the excess to retired pensioners and to the annuity accounts of active employees. These bonus checks became known as the "13th check" program, because the additional check was in excess of the twelve monthly pension checks the retiree would normally receive in one year. (Discl. Stmt. at 106.) Unlike a healthy investment system in which gains one year make up for losses in the last, Detroit's pension practices "ensur[ed] that the net performance of the [fund] would never exceed the assumed rate of return in any given year and that [unfunded liabilities] would continue to increase." *Id.* These practices "deprived the [fund] of assets that would be needed to support liabilities[.]" (*Id.*; Moore Decl. ¶ 19.)

Alarmed, Mayor Dennis Archer tried in the mid-1990s to amend the "13th check" program through the political process. The City proposed a charter revision that would have altered the program, but city unions obtained an injunction on the ground that such action "represented unilateral changes in the collective bargaining agreements . . . concerning matters that are mandatory subjects of collective bargaining." *Senior Accountants, Analysts & Appraisers Ass'n* v. *City of Detroit*, 553 N.W.2d 679, 682 (Mich. App. 1996). While the injunction was later reversed because "all parties agree[d] that the challenged provisions [could not] be implemented, even if enacted by the voters, without bargaining," *id.* at 683, the ballot proposal ultimately failed.

In November 2011, the City Council banned the 13th checks and ceased to guarantee minimum interest rates for annuity accounts after an outside statistician estimated that the practices had cost the City $1.9 billion. (Bankr. Dkt. 1066-1, Joseph Esuchanko Rep., Mar. 8, 2011, at 9.) But city unions again fought the action, citing Michigan law that pension plans are mandatory subjects of collective bargaining. The Michigan Employment Relations Commission agreed, but the City filed for bankruptcy in the interim, and the matter was stayed.

The public impact of the pension fund practices—a mandatory collective bargaining topic—is clear. In addition to the cost of the practice to the City of almost $2 billion, the decades-long bonus and annuity payments increased the amount the City needed to contribute each year to keep the pension fund solvent. Because of these increases, in 2005 the City borrowed $1.44 billion at high interest to plug the unfunded pension liabilities gap. (Bankr. Dkt. 11, Kevyn Orr Decl., Jul. 18, 2013 ("Orr Decl."), ¶¶ 45–48.)

Detroit's unfunded pension liabilities ballooned to one-fifth of its total debt at the time of its bankruptcy filing in July 2013—the largest municipal bankruptcy in this nation's history. Of over $18 billion in accrued obligations, the City's $3.5 billion in unfunded pension liabilities topped its list of the 20 largest unsecured claims. (Bankr. Dkt. 15, List of Creditors Holding 20 Largest Unsecured Claims, Jul. 18, 2013; Orr Decl. Ex. J, at 3; Eligibility Op. at 8.) In addition, the City had between $5.7 to $6.4 billion in other post-

employment benefit liabilities, almost entirely unfunded. (Orr Decl. Ex. J, at 3–4; Eligibility Op. at 16.)

The City's emergency manager, Kevyn Orr, explained the central role that collective bargaining played for the City. Orr informed the bankruptcy court that "the negotiation of changes to pension and retiree benefits" was "critical to any restructuring," given the "approximately $9 billion owed to these constituencies," and that such changes were impracticable, "if not impossible," outside of bankruptcy. (Orr Decl. ¶ 106.)

In addition to the pension problems specifically, Detroit's high labor costs in general—also a subject of collective bargaining—contributed to its bankruptcy. Labor costs for General Fund active employees (*i.e.*, wages, pension, and benefits) represented more than 41% of the City's estimated gross revenues for 2013. And onerous work rules enshrined in bargaining agreements hampered the City's efficient functioning, including staffing based on seniority rather than merit; "bumping" rights based again on seniority; limitations on management rights that impaired the City's ability to manage policies, goals, and the scope of operations for City departments; arbitration rights that allowed arbitrators to uphold future grievances based on expired bargaining agreements or past practice; and lack of reimbursement rights from unions. (Discl. Stmt. at 116–17.)

Far from being analogous to a private employment matter, issues at the heart of Detroit's collective bargaining contributed directly and

significantly to the City's financial distress. Detroit's financial shortfalls and inefficiencies—of which pension and other employment-related debts constituted a large percentage—had enormous public impact on the people of Detroit, the State of Michigan, and beyond.

As Bankruptcy Judge Steven Rhodes found, Detroit's financial situation "caus[ed] its nearly 700,000 residents to suffer hardship" and "danger[]." (Eligibility Op. at 139.) Detroit's municipal taxes were at the highest legal limit, yet Detroiters received greatly diminished public services as the City diverted money away from such basics as maintaining street lights and emergency response times. (Bankr. Dkt. 1, Petition, Jul. 18, 2013, Ex. A, at 3; Orr Decl. ¶¶ 29–30.) In 2013, for example, the average response time for top-priority emergency calls was 58 minutes, compared to the national average of 11 minutes. (Eligibility Op. at 21.) Forty percent of the City's streetlights were not working. (*Id.* at 20.) The crime rate was five times the national average, and equipment for police, EMS, and fire services was outdated and inadequate. (*Id.* at 20, 139.)

The State also felt the effects of Detroit's collective-bargaining shortfalls specifically, pledging $350 million to cover the City's pension shortfalls. (Bankr. Dkt. 8272, Order Confirming Eighth Amended Plan, Nov. 12, 2014, App. 1, at 55.)

The City of Detroit's dispute with unions about controversial pension fund practices illustrates the direct and far-reaching public consequences of policy topics at the heart of collective bargaining. Contra

Harris, 134 S. Ct. at 2655 (dissent) ("[T]his Court has never come close to holding that any matter of public employment affecting public spending (which is to say most such matters) becomes for that reason alone an issue of public concern."). Because of their significant fiscal impact, the public, including public employees, might well have strong views about the City's pension practices. Contra *Lehnert*, 500 U.S. at 521 ("[U]nlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views."). Compulsory agency fees force public employees to fund very specific points of view on these deeply important questions of fiscal policy. In short, collective bargaining affects public policy no less than does the supporting of candidates or parties.

2. Stockton, California

While Detroit is a leading example, it is only one of multiple recent municipal bankruptcies in which public-employee benefits have played a causal role.

The City of Stockton, California, for example, filed for bankruptcy in 2012, citing among other causes "unsustainable labor costs, retiree health benefits, and public debt." (City of Stockton, No. 12-32118, Bankr. E.D. Cal., Dkt. 1134, Discl. Stmt., Oct. 10, 2013, at 21.) The city took "drastic steps" to avoid insolvency, including renegotiating labor contracts, deferring payouts to retiring employees, and instituting "massive reductions in its workforce and employee compensation." (*Id.* at 25.) By reducing pay, pensions, benefits, and operational hours, and

by imposing furloughs and a hiring freeze, the city was able to save approximately $90 million over three years. (*Id.*)

Labor unions responded to the city's cost-saving measures by suing the city. (*Id.* at 11.) After successful mediation, the city was able to renegotiate its labor agreements. (*Id.* at 2.) But the savings were not enough. Even after the cuts, the city was still $25.9 million underwater. (*Id.* at 11.)

As in Detroit, Stockton's financial strain had a vast impact on the public interest. The city explained in bankruptcy that it "could not continue to make additional service reductions without jeopardizing the health, safety, and welfare of its residents." (*Id.* at 25.) Any further financial strain would require the city to shut down its library system, eliminate recreation programs, close all community centers, and close fire stations. (*Id.* at 13.) And any further reduction in pension benefits would lead to a "mass exodus of City employees" with "catastrophic" consequences for the city's ability to provide "even the most basic of essential public protections." (*Id.* at 23–24.)

The inflated compensation and benefits that preceded Stockton's bankruptcy harmed the interests of city employees not just as citizens, but also as employees. While in theory unions garnered those benefits in the employees' best interests, the city noted that "the constituencies that will bear the greatest burden" of the city's bankruptcy are its public employees. Those employees held approximately $545 million in claims but agreed, out of necessity, to accept less than a penny to the dollar

($5.1 million) in satisfaction of those claims. (*Id.* at 12.) And the city's new labor agreements eliminated retiree health benefits worth approximately $1 billion. (*Id.* at 12–13.) Had they had a choice in the matter, Stockton's employees may well have objected to the inflated benefits obtained through collective bargaining, both as citizens interested in the city's public services and as employees interested in a reliable financial future.

3. San Bernardino, California

A similar story played out in San Bernardino, California, which filed for bankruptcy in 2012. The city cited labor costs as its "largest General Fund expenditure," projected to account for roughly 78% of all General Fund expenditures in the 2012–13 fiscal year. (City of San Bernardino, No. 6:12-bk-28006-MJ, Bankr. C.D. Cal., Dkt. 1504, Discl. Stmt., May 29, 2015, at 19–20.) As of June 2012, the city's unfunded pension liability reached approximately $323.1 million, created primarily by decisions to approve enhanced pension benefits and exacerbated by, among other factors, a decision to approve enhanced benefits on a retroactive basis without funding them. (*Id.* at 16–17.) The city's budget deficit was projected to grow approximately $49 million each year for the next five years due to, among other things, increasing pension and other post-retirement benefit costs and unfunded liabilities in retiree health. (*Id.* at 21–22.)

For several years before filing for bankruptcy, the city tried to balance its budget by negotiating reductions in employee costs and eliminating positions, "which resulted in service level reductions

to the community." (*Id.* at 19–20.) While the city was able to negotiate labor concessions with most city employees, resulting in savings of $10 million annually, it could not reach agreement with the city's fire safety union. When the city imposed salary cuts unilaterally in response, the union filed a lawsuit and obtained a judgment against the city. (*Id.*)

As in the above examples, San Bernardino's bankruptcy has harmed both the public and the city's employees. The city's budget cuts forced it to decrease its services to the community and, as in Stockton, risked an exodus of city employees. (*Id.* at 18–20.) And its unsustainable labor commitments have forced it to consider contracting private agencies for city services, a strategy designed to decrease the number of public employees and corresponding pension obligations going forward. (*Id.* at 18.)

B. Public-employee benefits are also of significant public interest at the state level.

The current crisis in public-employee benefits extends far beyond fallen municipalities. As of 2010, the gap between states' assets and their obligations for public-sector retirement benefits was $1.38 *trillion*. (PEW Center on the States, *The Widening Gap Update*, June 2012, http://goo.gl/rclKjR.) A combination of investment return shortfalls, missed contributions, and unfunded benefit increases left states with a $452 billion unfunded liability for pensions alone in 2008, and by 2010 that pension gap had grown to $757 billion. (PEW Charitable Trusts, *The Fiscal Health of State Pension Plans*, Apr. 8,

2014, http://goo.gl/NvyNkH.) California—a respondent in this case—had nearly $170 billion in pension debt as of 2013. (PEW Charitable Trusts, *The Fiscal Health of State Pension Plans*, Jul. 31, 2015, http://goo.gl/SLDpi2.)

The PEW Center on the States has warned that many states "will not be able to keep up in the long term without some combination of higher contributions from taxpayers and employees, deep benefit cuts, and, in some cases, changes in how retirement plans are structured and benefits are distributed," *id.*—all traditional topics of collective bargaining. (See PEW Center on the States, *The Widening Gap Update* June 2012, http://goo.gl/rclKjR.)

Illinois, for example, is burdened by over $100 billion in unfunded liabilities for its state-funded retirement systems. *In re Pension Reform Litig.*, 32 N.E.3d 1, 9 n.5 (Ill. 2015); Comm'n on Gov't Forecasting and Accountability, *Special Pension Briefing*, Nov. 2014, at 1–2, http://goo.gl/mvvpyB. While public-employee unions, the City of Chicago, and the state legislature have attempted to negotiate a solution to the State's ballooning benefits debt—negotiations the Cook County Circuit Court described as "no different in concept than legislative advocacy on behalf of any interest group supporting collective interests to a lawmaking body"—unions have halted various reforms through litigation under the state constitution's pension-protection clause. *In re Pension Reform Litig.*, 32 N.E.3d at 4; *Jones* v. *Mun. Employees' Annuity and Ben. Fund of Chicago*, No. 14CH20027, 2015 WL 4662009, at 31 (Ill. Cir. Ct., Cook Cty., Jul. 24, 2015).

Illinois's unfunded pension liabilities are of immense public concern to its citizens. The state has described its pension shortfall is "one of the most difficult problems" its government has faced "for more than three decades," and has acknowledged that "[u]nsustainable pension costs are squeezing core programs in education, public safety, and human services, in addition to limiting [the State's] ability to pay [its] bills," resulting in downgrades in the State's credit rating. State of Illinois, Release No. 9389, 105 S.E.C. Docket 3381 (Mar. 11, 2013), 2013 WL 873208, at *4; *In re Pension Reform Litig.*, 32 N.E.3d at 10. How the state and its public-employee unions decide to address this problem will have significant effects not only for its employees, but for its citizenry at large.

Just next door, Wisconsin's recent experience has shown the dramatic fiscal impact of curbing public-sector collective bargaining. In March 2011, the state legislature passed Act 10—a budget repair bill that significantly altered Wisconsin's public-employee labor laws. *Madison Teachers, Inc.* v. *Walker*, 851 N.W.2d 337, 346 (Wis. 2014). Act 10 gave local governments the tools, such as increasing employee contributions to retirement and removing benefits from collective bargaining, to make up for reductions in local aids that were necessary to balance a multi-billion dollar deficit in the 2011 biennial state budget. *Number of Wisconsin Teachers, School Staff Increases in 2013*, Wisconsin Taxpayers Alliance, Aug. 20, 2013, http://goo.gl/6VQy4i. The collective-bargaining changes "allowed districts to change health plans, require higher copays and deductibles,

and make other changes to benefits," with the goal of minimizing or avoiding layoffs. *Id.*

While there has been debate about Act 10 as a policy matter, it is undeniable that it has had a public impact. According to one study, increased employee pension and health insurance contributions "helped Wisconsin not only balance its budget, but cut income taxes by nearly $650 million and property taxes by $100 million" over a two-year period. Nick Novak, *Update: Act 10 Savings Up to $2.7 Billion*, MacIver Institute, Oct. 24, 2013, http://goo.gl/EsuQME.

Impacts on municipalities and local school districts were equally pronounced. Instead of rising an average of 2.2% per year, as it had from 2006 through 2011, municipal spending fell 3.0% in 2012. *Municipal Spending Declines*, Wisconsin Taxpayers Alliance, Sept. 3, 2014, http://goo.gl/ksPW2S. The Milwaukee County Board, for example, projected $24 million in savings for its 2012 budget, and $101 million in 2020, largely from higher employee health and pension benefit contributions. Steve Schultze, *County Board Overrides Most of Abele's Budget Vetoes*, Nov. 16, 2011, http://goo.gl/Om8yUh; Nick Novak, *Update: Act 10 Savings Up to $2.7 Billion*, MacIver Institute, Oct. 24, 2013, http://goo.gl/EsuQME.

In local school districts, total school spending dropped $584 million in 2011 through 2012, with 63% of that coming from benefit savings. *School Districts Benefit Costs $366 Million Lower in 2012*, Wisconsin Taxpayers Alliance, Nov. 12, 2012, http://goo.gl/wftDiu. Several school districts were

able to save money by redesigning their employee health plans, due to increased competition among providers, lower premiums, and higher employee contributions. See, e.g., *id.*; *Cost-Saving Moves Help MPS Over Time*, Milwaukee Journal Sentinel, Dec. 1, 2011, http://goo.gl/JbGgAO (increased employee contributions projected to reduce next-year deficit from $24 million to $8 million, with savings of $900 million over 30 years); Dinesh Ramde, *Madison Matters: WEA Is Forced to Adapt*, La Crosse Tribune, Apr. 16, 2012, http://goo.gl/xSgcru (saving a projected $2 million); Sharon Roznik, *North Fond du Lac School District Saves Big with New Health Insurance Plan*, Fond du Lac Reporter, Nov. 30, 2011, http://goo.gl/vcQ010 (projected savings of $3.3 million over two years); Patrick Anderson and Bob Seaquist, *Insurance Switch to Save Onalaska District $800K*, La Crosse Tribune, Mar. 28, 2012, http://goo.gl/a6q3Q; Rick Romano, *Elmbrook School District Projects 2% Drop in Spending*, Brookfield Now, Apr. 18, 2012, http://goo.gl/XK6idQ (saving $650,000 for year, crediting Act 10); Dorothy Jasperson-Robson, *School District Insurance Change to Save $485,458*, Westby Times, Apr. 5, 2012, http://goo.gl/Xj6cO (crediting Act 10).

School districts were also able to save money by cutting down on government pension contributions. See, e.g., Erin Richards, *MPS to End Teachers' Second Pension in 2013*, Milwaukee Journal Sentinel, Apr. 5, 2012, http://goo.gl/EtE8ro (projected savings of $5 million per year by ending second, supplemental pension); Amanda Podgorny, *Rock County Approves 2012 Budget*, Beloit Daily News, Nov. 15, 2011, http://goo.gl/8ZOnNX (projected

savings of $2.9 million per year); Bob Seaquist, *Onalaska District Looks to Save on Retirees*, Onalaska Holmen Courier-Life News, Mar. 1, 2012, http://goo.gl/OctZkN (projected savings of $7.3 million over 30 years). And while Act 10 resulted in the reduction of teaching staffs in some districts, it allowed other districts to add teachers or avoid layoffs. See, e.g., *Number of Wisconsin Teachers, School Staff Increases in 2013*, Wisconsin Taxpayers Alliance, Aug. 20, 2013, http://goo.gl/6VQy4i; Kathleen Foody, *Marathon County Presents 2012 Budget*, Wausau Daily Herald, Nov. 9, 2011, http://goo.gl/mO0XjT. Wisconsin's experience, of course, belies the claim that collective bargaining in the public sector pertains mostly to private concerns involving only the government's interests as an employer.

C. Collective bargaining can also have significant non-fiscal effects—for example, impeding environmental compliance.

As daunting as current state and municipality labor-related debt is, the public impact of collective bargaining is not limited to financial matters. Take, for example, Detroit's environmental compliance.

The Detroit Personnel Department provides the following job description for the official Horseshoer of the city water department: "Under general supervision, to shoe horses and to do general blacksmith work in connection therewith"; "[h]aving charge of a small blacksmith shop where horse shoeing is the most important work done; individually performing such work as removing old shoes;

forging, shaping, hardening, tempering, fitting and setting shoes to horses; welding corks to shoes; trimming up hooves before and after shoeing; making repairs to stable equipment, saddles, bridles and other equipment requiring blacksmith work." (Detroit Personnel Dep't, Code 71-31-31, http://goo.gl/Oubkt5. See also Master Agmt. between the City of Detroit and Michigan Council 25, AFSCME and AFL-CIO, Jul. 1, 2008–Jun. 30, 2012, at 137, http://goo.gl/R6iZ O (listing horseshoer position).)

The water department has no horses. Yet city unions objected to the elimination of the Horseshoer and other superfluous positions in 2012, following an audit report that recommended cutting 81% of the department's work force over a five-year period and outsourcing billing, maintenance, and other functions. See John Wisely, *Detroit Water Department to Cut 81% of Workers Under New Proposal*, Detroit Free Press, Aug. 9, 2012, http://goo.gl/fufyuT.

The outside audit firm found staggering levels of inefficiency and waste in the Detroit Water and Sewerage Department ("DWSD"), including an average cost of $86,135 per employee for close to 2,000 employees, when fewer than 400 would suffice. The report also concluded that the Department's 257 job classifications—containing three to five skill levels per classification—could be reduced to 31. Auditors estimated that the recommended reduction and outsourcing measures would save the Department roughly $900 million over a decade. (Brian Hurding & Denise O'Berry, Organization

Assessment Presentation of Results, EMA, Aug. 2012, slides 26, 32, 35, 38, http://goo.gl/I13cn2.)

The DWSD's inefficiencies, combined with the department's backlog in needed maintenance and upgrades, and debt (the service of which took up 44% of revenues), all led to dramatically inflated water rates for the residents of the Detroit metropolitan area. (*Id.* at slides 4–6; Stephen Henderson, *Intolerable Waste in Detroit's Water Department*, Detroit Free Press, Aug. 9, 2012, http://goo.gl/zquhT.)

But the public impact of this waste was not merely financial. In a September 9, 2011 order, United States District Judge Sean Cox found that the DWSD's collective bargaining-induced inefficiencies were preventing it from meeting its minimum environmental requirements under the federal Clean Water Act. Noting that the department had remained in a recurring cycle of non-compliance for over thirty years, Judge Cox listed several "root causes" for the continued non-compliance, including: "excessive and unnecessary delays in hiring qualified personnel"; "the DWSD's required use of the City's Human Resources Department, resulting in significant delays in filling critical positions at the DWSD"; "the City's personnel policies, civil service rules, and union rules and agreements, restricting the compensation, recruitment and prompt hiring of necessary personnel"; and "obsolete job descriptions and qualifications." *United States* v. *City of Detroit*, No. 77-71100, 2011 WL 4014409, at *22 (E.D. Mich. Sept. 9, 2011).

Finding specifically that "certain CBA [collective bargaining agreement] provisions and work rules"

were "impeding the DWSD from achieving and maintaining both short-term and long-term compliance with its NPDES permit and the Clean Water Act," the court struck and enjoined then-in-force CBA provisions or work rules that threatened compliance and prohibited future CBAs from containing terms that threaten long-term compliance. *United States* v. *City of Detroit*, No. 77-71100, Dkt. 2410, at *4–6 (E.D. Mich. Nov. 4, 2011). In particular, the court:

- enjoined CBA provisions regarding "bumping" rights (*i.e.*, "any provisions in current CBAs that allow an employee from outside the DWSD to transfer ('bump') into the DWSD based on seniority");

- struck prohibitions on subcontracting or outsourcing;

- limited excused hours for union activities to attending grievance hearings and union negotiations;

- ordered a review of employee classifications to reduce their number and increase workforce flexibility;

- ordered promotions to be based on skill, knowledge, and ability, before taking seniority into account; and

- enjoined provisions that prevented management from assigning overtime work to the most capable employees.

Id. at 7. Put simply, the court found that without "fundamental corrective measures . . . to address the institutional and bureaucratic barriers to compliance," environmental compliance "will simply not occur." *Id.* at 2.

Like Detroit's pension problems, the DWSD's collective-bargaining activities directly created problems of public concern. The effects of bloating and bureaucracy in the water department were not merely private concerns that implicated the government's interests as employer; instead, the waste and inefficiency raised water rates for the public at large and directly harmed the health of Lake Erie. And while the optimum staffing levels to achieve federal environmental compliance remain subject to debate, there is no question that the debate is about a matter of great public concern.

* * *

These examples show not only that public-sector unions advocate contentious policy positions on topics at the heart of collective bargaining, but also that those bargaining positions often have direct and far-reaching public consequences. Detroit's $3.5 billion in unfunded pension liabilities was not merely a private concern that implicated the City's interests as an employer, just as its high water bills and thirty years of environmental non-compliance were not merely private concerns. These issues are instead of great concern to the public at large.

Nor can it be assumed that the policies public-sector unions advocate in bargaining provide a benefit to all employees—either as citizens, or as

employees. While it may seem elementary in the private sector that a higher salary or increased pension is an individual good that all employees would view as a benefit, that is not always true in the public sector, where such benefits are inextricably tied up with the public interest. To say that core collective-bargaining topics like wages and hours pertain mostly to private concerns minimizes the public employee's interest, as a citizen, in responsible government, and it also assumes that every such employee is only self-interested—i.e., that he necessarily views a personal pay raise as a benefit, to the exclusion of any other community-oriented preferences on how public resources should be allocated. Many public servants are motivated by interests beyond their own individual interests. And many would be concerned about a ballooning $3.5 billion debt and decades-long pollution of Lake Erie.

Nor are unions' collective bargaining positions always in the best interests of public employees *as employees*. As the multiple recent municipal bankruptcies show, it is often the employees themselves who are hit the hardest when a city cannot keep up with union demands. Forced to choose between modest but reliable benefits that may allow for long-term employment and robust benefits of questionable long-term viability, an employee may well opt for the former.

The above examples of public-sector bargaining also illustrate that, in some instances, bargaining not only involves contentious policy choices with large consequences, it also becomes a policy bottle-neck as nearly the only available outlet for

addressing a policy problem, absent a large-scale systemic overhaul of the sort Wisconsin employed. The City of Detroit made multiple attempts to address its growing pension problem, including through the political process, but it was stopped every time with claims that the pensions could be addressed only in collective bargaining. Stockton and San Bernardino likewise ran headlong into litigation when they tried to control their ballooning debt without the unions' blessing. Similarly, the Detroit water department tried and failed for thirty years to achieve environmental compliance, to the point that a federal judge felt it necessary to free the department from some of its collective-bargaining obligations. In such instances, public employees who must pay agency fees are forced not only to fund policy positions with which they disagree, on topics that are core to collective bargaining, and which have enormous public consequences, but they are also forced to subsidize the union's policy monopoly in collective bargaining, with virtually no other recourse in the general political process.

In short, given the enormous power of the modern public-sector union and the often vast public-policy consequences of its collective bargaining activities, requiring a public employee to subsidize those activities is materially indistinguishable from the forced subsidization of a political party. *Abood*, 431 U.S. at 256 (Powell, J., concurring) ("[T]he public-sector union is indistinguishable from the traditional political party in this country."); *id.* at 243–44 (Rehnquist, J., concurring) ("I am unable to see a constitutional distinction between a governmentally imposed requirement that a public

employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union."). The Constitution does not permit this type of coerced political speech. "Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, [] the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible." *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. at 522. That should be the end of the matter.

CONCLUSION

This Court should overrule *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and hold that compulsory agency fees to public-sector unions, including for activities related to the union's role as exclusive bargaining representative, violate the First Amendment.

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